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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 602

THE STATE OF ALABAMA,

Petitioner,

vs.

KING & BOOZER, A PARTNERSHIP COMPOSED OF TOM COBB KING AND SIMON ELBERT BOOZER, RESIDENTS OF CALHOUN COUNTY, ALABAMA, AND THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

REPLY BRIEF ON BEHALF OF PETITIONER.

THOMAS S. LAWSON,
Attorney General of Alabama;
JOHN W. LAPSLEY,
J. EDWARD THORNTON,
Assistant Attorneys General of Alabama,
Counsel for Petitioner.

GARDNER F. GOODWYN, JR.,
Of Counsel.

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Intervener.

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REPLY BRIEF ON BEHALF OF PETITIONER.

In reply to the Brief for the United States, the petitioner submits the following:

I.

Title Provision in the Contract, Section 3, Article I.

Petitioner calls attention to the omission (on page 13 of the Government's Brief) of any mention of the qualifying provision in the section of the contract relating to title. Such qualifying provision reads as follows: "These provisions as to title being vested in the Government shall not

If

operate to relieve the Contractor from any duties imposed under the terms of this contract." It will also be noted that such brief (p. 13) omits mention of the additional requirement for "acceptance in writing by the Contracting Officer". These omissions likewise appear in the discussion of the title provision on page 89 and 94 of the Brief for the Government.

It is the further contention of the petitioner that under the provisions of the Act of August 7, 1939, Public No. 309, 53 Stat. 1239, it was the intent of Congress that the acceptance of title to materials was authorized for the purpose of minimizing insurance costs, as indicated by the following provision of such Act, namely:

> "(c) In any project the contract for which is negotiated under authority of this section, the Secretary of War may waive the requirement of a performance and a payment bond *and may accept materials required for any such project at such place or places as he may deem necessary to minimize insurance costs.*"

In further considering the purposes of the title provision in the contract, see Section 1(c) of the Act of July 2, 1940 (Appendix, *infra*, p. —), under which the Secretary of War was authorized to advance payments to contractors for supplies or construction not to exceed 30 per centum of the contract price, upon such terms, conditions and adequate security as the Secretary of War shall prescribe. This provision further supports our insistence that the provisions of the contract relating to the vesting in the Government of title to materials (if the same became effective in this case, which we do not concede), were in the nature of a security or pledge, the contractor remaining the beneficial owner. This construction seems to be the only consistent explanation of the arrangement; and, of course, the contractor's pledge of his materials did not affect the taxable character of his purchaser.

Petitioner further wishes to correct the statement made in the Brief on behalf of the Government (Br., p. 89), where it is stated that petitioner "apparently does not deny that title went directly to the United States (Br. 38)." We did not so intend, nor do we believe our Brief is subject to such construction. No such admission was intended.

II.

No Immunity by Reason of the Status of the Contractor.

In the Brief on behalf of the Government (pp. 94-96), as we construe it, it is conceded that the status of the Contractor was not that of an agency or instrumentality of the Government, clothed with the implied constitutional immunity of the sovereign from State taxation.

Contractor Not Authorized to Act as Agent for the United States—No Relationship of Principal and Agent.

Further, as we construe it, the Government concedes (pp. 111-117 of its Brief) that in the consideration of other National Defense Acts passed prior to the Act under which the contract here involved was authorized, Congress twice refused to adopt amendments proposed to authorize contractors under cost-plus-a-fixed-fee contracts to be designated as agents of the Government and in the purchase of materials to be exempt from Federal, State or local taxes. (Act of June 11, 1940 and Act of June 15, 1940.) [1]

From the foregoing we conclude the Government admits that the purchases were not made by the contractor acting as agent for the Government, in such manner as to bind the Government as a disclosed or undisclosed principal. While admitting that the Contractor became individually liable to the vendor, and paid the purchase price with his

[1] See pp. 112-116, and notes in Government's Brief.

own funds, it is contended on behalf of the Government that the United States was nevertheless the purchaser, and that the title did not pass to or through the Contractor, but passed directly from the vendor to the United States.

Such contention, as we construe it, is inconsistent, and presents a practical as well as a legal anomaly.

As said by Judge Somerville, in *Gillis* v. *White*, 214 Ala. 22, 106 So. 166 (1925):

> "When one contracts merely as the agent of a disclosed principal, he binds either his principal or himself, but not both; and a joint action against both involves a practical as well as a legal anomaly."

See 3 *Corpus Juris*, Section 241, pp. 165, 166.

See also Restatement of the Law, Vol. 1, Section 147 (a) and (b), pp. 375, 376, where it is stated:

> "b. If it is agreed that the third party is to contract solely with the agent, the principal does not become a party to the transaction; * * *."

See *Standard Oil Co.* v. *Fontenot*, decided October 17, 1941 (pp. 2, 25, Supplemental Brief, *amicus curiae*, on behalf of the State of Louisiana).

III.

History of Various Acts Relating to Cost-Plus-A-Fixed-Fee Form of Contracts.

See Appendix, *infra*, pages ——, setting forth pertinent provisions of Acts of Congress adopted prior to the Act of July 2, 1940 under which the contract in this case was executed, and of certain subsequent Acts relating to cost-plus-a-fixed-fee contract.

An examination of the pertinent provisions of such Acts shows that when Congress in the Act of July 2, 1940 authorized the use of the cost-plus-a-fixed-fee form of contract,

it had reference to the form previously authorized, and intended that such contracts should conform to the provisions of such previous Acts, and be subject to the conditions and limitations therein provided. In this connection, it is assumed that both the Navy and War Department contracts in such form had been previously reported to and filed with Congress pursuant to the Acts of April 25, 1939 and August 7, 1939, respectively.

IV.

The Sale to the Contractors Was Taxable.

If the Contractors purchased as independent Contractors, which we contend was the case, it is conceded that the tax constituted an "applicable" State tax which is valid and should be paid by the Contractors as a part of cost of construction.

On the other hand, if the Contractors, acting as authorized agents for the Government (which we do not concede was the case), purchased in their own names with the stipulation that the Government was not expressly or impliedly bound by the contract of purchase entered into between King and Boozer and the Contractors, it is our contention that the sale was consummated between King and Boozer and the Contractors upon delivery of the material pursuant to instructions given to the vendor, and that title thereupon necessarily passed to the Contractors, as purchasers, in such manner as to constitute a taxable transaction under the Alabama Sales Tax Act. The incidence of the tax was the sale, which we contend under any possible legal construction was from the vendor to the Contractors. Furthermore, as the materials were sold by King and Boozer to the Contractors, the transaction was taxable even if the vendor had been instructed to deliver the materials directly to the United States, which, of course, we do not concede was done, as the materials were to be shipped or delivered to the Con-

structing Quartermaster "for the account of" Dunn & Hodgson, the Contractors.

Conclusion.

It is, therefore, our conclusion that even though the Alabama Sales Tax Act may be construed as imposing a tax upon the vendee, as the Contractors were the purchasers—the vendees—in this case, and as the tax is non-discriminatory, it is not repugnant to the Constitution of the United States; and that its validity is in this case analogous to a non-discriminatory tax imposed solely upon the vendor, which the Government concedes should be held valid.

Respectfully submitted,

THOMAS S. LAWSON,
Attorney General of Alabama.
JOHN W. LAPSLEY,
Assistant Attorney General.
J. EWARD THORNTON,
Assistant Attorney General.

GARDNER F. GOODWYN, JR.,
Of Counsel.

APPENDIX.

1. Act of April 25, 1939 (H. R. 4278), Public No. 43, 53 Stat. 590.

Sec. 4 authorizes use of "contracts upon a cost-plus-a-fixed-fee basis" to enable the Secretary of the Navy "to accomplish without delay or excessive cost" certain projects outside the continental United States.

(a) Fee not to exceed "*10 per centum of the estimated cost of the contract,* exclusive of the fee." (Sec. 4(a))

(b) Contract to be made "upon such terms and conditions as the Secretary of the Navy may determine to be *fair and equitable* and *in the interest of national defense.*" (Sec. 4(b))

(c) Naval officer to be detailed as a representative of the Contracting Officer, to attend meetings of Contractor etc. "for the purpose of *submitting propositions, propounding questions,* and *receiving information* relative to any matter within the purview of the contract *with the intent and for the purpose of safeguarding the interests of the United States,* coordinating efforts, and *promoting mutually beneficial relationships,* and *making decisions within the scope of his delegated authority and not in conflict with any provision of the contract.*" (Sec. 4(b))

(d) Secretary of Navy may waive performance and payment bond, "and *may accept materials required for such project at such place or places as he may deem necessary to minimize insurance costs.* (Sec. 4(c))

(e) Contract may contain provisions under which "*any loss of or major damage to the plant, materials, or supplies of any contractor,* not due to negligence or fault of the contractor, or his agents or servants, while the same is necessarily in transit upon or lying in the open sea, will be investigated by a board of naval officers and reported to Congress with recommendations. (Sec. 4(d))

(f) Secretary of the Navy required annually to report to Congress all contracts executed under such section, to-

gether with copies of the contracts so executed. (Italics supplied.)

2. Act of August 7, 1939 (S. 2562), Public No. 309, 53 Stat. 1239.

Section 1 authorized use of "contracts upon a cost-plus-a-fixed-fee basis" to enable the Secretary of War to accomplish without delay or excessive costs certain public-works in Alaska and the Panama Canal Zone, in connection with the National defense. This Act contains substantially the same provisions, conditions and limitations as in the Act of April 25, 1939, except the authority is vested in the Secretary of War and Army officers instead of the Secretary of the Navy and Naval officers.

For brevity, reference is here made to comments upon provisions in the Act of April 25, 1939.

3. Act of June 11, 1940 (H. R. 8438), Public No. 588, 54 Stat. 265, 294, relating to the Navy Department, provided:

"The provisions of Section 4 of the Act approved April 25, 1939 (53 Stat. 590-592), shall be applicable to all public works and public utilities projects mentioned in this Act regardless of location."

4. Act of June 26, 1940 (H. R. 10055), Public No. 667, 54 Stat. 599, 608, made provisions of the Act of April 25, 1939, applicable to Title III relating to Navy Department construction, but reduced the contractor's fee to 6%.

5. Act of June 28, 1940 (H. R. 9822), Public No. 671, 54 Stat. 676, 677, contained a provision: "That the fixed fee to be paid the contractor as a result of any contract entered into under the authority of this subsection, *or any War Department contract entered into in the form of cost-plus-a-fixed fee, shall not exceed 7 per centum of the estimated cost of the contract* (exclusive of the fee as determined by the Secretary of the Navy or the *Secretary of War*, as the case may be)." (Italics supplied.)

6. Act of July 2, 1940 (H. R. 9850), Public No. 703, 54 Stat. 712, 713. This is one of the Acts specifically mentioned in and under which the Contract involved in this

case was executed. In Section 1(a), it is provided: "That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee *form* of contract when such use is deemed necessary by the Secretary of War." In Section 1(c), it is provided: "(c) Whenever, prior to July 1, 1942, the Secretary of War deems it necessary in the interest of national defense he is authorized, from appropriations available therefor, *to advance payments to contractors for supplies or construction for the War Department in amounts not exceeding 30 per centum of the contract price of such supplies or construction. Such advances shall be made upon such terms and conditions and with such adequate security as the Secretary of War shall prescribe.* (Italics supplied.)

7. Act of September 9, 1940 (H. R. 10263), Public No. 781, 54 Stat. 872, 873, provided: "That the Secretary of War may, with respect to contracts for public works for the Military Establishment entered into upon a cost-plus-a-fixed-fee basis out of funds appropriated for the fiscal year 1941, or authorized to be entered into prior to July 1, 1941, waive the requirements as to performance and payment bonds of the Act approved August 24, 1935 (49 Stat. 793; 40 U. S. C. 270a): Provided further, That the fixed fee to be paid the contractor as a result of any such public works contract hereafter entered into shall not exceed 6 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the Secretary of War."

8. Act of October 8, 1940 (H. R. 10572), Public No. 800, 54 Stat. 965, 967, 968, amended Public No. 781, so as to reduce the contractor's fee from 7% to 6%; and provided for all such contracts to be reported to Congress monthly by the Secretary of War and the Secretary of the Navy—first reports to cover the period July 1 to October 31, 1940.